INDEX.

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED	1
COUNTER-STATEMENT OF THE CASE	1
ARGUMENT	4
I. The Court of Appeals Exercised Proper Discretionary Power in Dismissing the Action	4
II. There Is No Reason for Review	5
CONCLUSION	6

TABLE OF CITATIONS.

	Page
Cantey v. McLain Line, Inc., 312 U. S. 667, 1941 A. M. C. 657	5
Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212 (1947)	4
Desper v. Starved Rock Ferry Co., 342 U. S. 187, 1952 A. M. C. 12	5
Federal Rules of Civil Procedure, Rule 50(b)	4, 5
Fountain v. Filson, 336 U. S. 681 (1949)	4
Globe Liquor Co. v. San Roman, 332 U. S. 571 (1948)	4
Johnson v. New York, N. H. & H. R. Co., 344 U. S. 48 (1952)	4
Montgomery Ward & Co. v. Duncan, 311 U. S. 243 (1940)	4
Norton v. Warner Co., 321 U. S. 565, 1944 A. M. C. 337	5
Zientek v. Reading Co., 220 F. (2d) 183 (C. A. 3, 1955)	4

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957

No. 461.

McALLISTER LIGHTERAGE LINE, INC.,

Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA AND SCOTT PAPER COMPANY,

Respondents.

BRIEF ON BEHALF OF INSURANCE COMPANY OF NORTH AMERICA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

COUNTER-STATEMENT OF QUESTION PRESENTED.

The sole question presented by the Petition with regard to Insurance Company of North America is whether the Court of Appeals for the Second Circuit erred in finding, upon undisputed evidence which involved no conflicting inferences, that the insurance carrier's liability should not have been submitted to the jury.

COUNTER-STATEMENT OF THE CASE.

Petitioner, as owner of Scow 58, agreed with Scott Paper Company, the other Respondent, to recaulk the vessel as part of the reconditioning required to fit her for use under the charter party with Scott Paper Company (18a, 27a).* After drydocking, petitioner towed the scow from

*. Refers to pages in Appellant's Appendix as filed in the Court of Appeals.

New York to Wilmington, Delaware, where the vessel was delivered to the charterer on the night of August 25, 1953 and loading began the following day. While the first lot of wood pulp was being loaded, the charterer requested Insurance Company of North America to extend its hull policy to cover Scow 58.

On August 26, 1953 a representative of the insurance carrier was assured by petitioner that the scow was seaworthy. See Jury's answer to Special Interrogatory 4a (86a). The policy endorsement accordingly was issued that day and attached at once.

The evidence is uncontradicted and indisputable that the vessel was unseaworthy at the time of Petitioner's warranty, and it is not susceptible (as Petitioner urges) to conflicting inferences which must be resolved by a jury.

The uncontradicted factual evidence shows the following facts:

Loading was completed on August 27, 1953. While the scow was being towed by tug on her first trip from Wilmington Marine Terminal to charterer's plant at Chester, Pennsylvania, on the Delaware River she suddenly filled and sank when only a few miles from her starting point. The weather was clear, the water was calm, and the tug master testified that *nothing unusual occurred to account for the sinking* (24a).

Shortly after the scow was raised and placed in drydock at Camden, New Jersey, it was surveyed by representatives of petitioner and the respondents. They found an open seam 18 inches long which caused the sinking (41a, 42a). Tails of oakum were still hanging down at each end of the gap. This is a characteristic precaution employed by caulkers to locate spots where they cannot then finish a seam due to the interference of the "dock blocks" which support such vessels in drydock (44a-48a), but which are intended to be completed when the vessel is later shifted on the blocks.

Respondent's surveyor, Capt. Hansen, testified, without contradiction, that the caulkers had scraped out the old caulking from the seam, shaped like an inverted "Y" (40a), leaving a residue in the narrow upper section, and neglected to recaulk the flare (46a, 48a), and particularly that the residue of oakum concealed the defect until the scow was loaded and subjected to normal stresses of towing, saying:

> "There was undoubtedly or unquestionably a residue of oakum and cotton in that seam where the oakum had been reaved out, and that portion of the seam had not been recaulked. On the way down to Wilmington that residue remained in place and continued to remain there during the voyage and while it was in Wilmington being loaded. And it was after the boat received its cargo and was subjected to the pressure, the increased pressure of water against that portion of the seam, that that residue of oakum eventually blew out and water entered the boat through that open seam." (49a, 50a)

Petitioner did not call any witness to contradict Capt. Hansen, and has not disputed the accuracy of his testimony on that point.

Respondent Insurance Company of North America moved for a directed verdict in its favor on the ground that the conceded facts established beyond question that when the policy endorsement attached the scow was actually unfit to perform her contracted services, and hence unseaworthy. This motion was denied, and, following the verdict against the insurance carrier for the full amount of its policy, a motion for judgment non obstante veredicto was filed and subsequently refused by the trial judge.

The Court of Appeals found that the uncontradicted evidence clearly proved the petitioner's breach of its warranty of seaworthiness, and directed dismissal of the complaint against the insurance carrier.

ARGUMENT.

I. The Court of Appeals Exercised Proper Discretionary Power in Dismissing the Action.

The authority of the Court of Appeals to enter judgment notwithstanding the jury's verdict at the trial has been recognized by this Court on numerous occasions, subject only to the timely filing of a motion for judgment non obstante veredicto by the appellant at the close of the trial as required by Rule 50(b) of the Federal Rules of Civil Procedure. *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947); *Globe Liquor Co. v. San Roman*, 332 U. S. 571 (1948); *Fountain v. Filson*, 336 U. S. 681 (1949); and *Johnson v. New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952).

Motion for judgment non obstante veredicto was filed by the insurance carrier in the present case (87a).

Where the evidence is so conclusive that the trial judge should have granted judgment non obstante veredicto, the Court of Appeals has full discretionary power to reverse the judgment and dismiss the action.

In *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243 (1940), this Court gave guiding directions in applying Rule 50(b), pointing out at page 253 that "* * * the courts should so administer the rule as to accomplish all that is permissible under its terms." Referring to this passage in *Johnson v. New York, N. H. & H. R. Co., supra*, at page 56, it was stated that "This attitude was made specific by the statement that if the trial judge rules, as he properly should, on alternative motions for judgment n.o.v. and for a new trial, and denies them both, the appellate court may reverse the former action and direct the entry of judgment n.o.v."

In *Zientek v. Reading Co.*, 220 F. (2d) 183 (C. A. 3, 1955), the appellate court concluded by stating:

"Since there was no evidence upon which a jury could have found that appellee was a crew member of any vessel the judgment below will be reversed with directions to dismiss the action."

In the present instance, the Court of Appeals did not substitute its own inferences for those of the jury, but recognized that, on the basis of the undisputed evidence, no question remained for the jury to decide in respect to the unseaworthy condition of Scow 58 and Petitioner's breach of its warranty.

II. There Is No Reason for Review.

In exercising the authority granted by Rule 50(b) the action of the Court of Appeals presents no question for review by this Court. Its decision was based upon the specific facts contained in the testimony. There is no conflict with decisions in its own or other courts, either state or federal; the law involved is well settled; and there has been no departure from the accepted and usual course of judicial proceedings.

Petitioner urges review on the vague generality that the shipping industry is concerned with the result of setting aside a jury verdict. The assumption is unwarranted and there is manifestly no such concern. On the contrary, where in a case like this (in which the evidence was insufficient to make out an issue for the jury) the shipping industry, as well as all other businesses, should, and do, appreciate the protection of their rights afforded by an appellate tribunal acting under law, as the Court below has done herein. A jury's verdict does not possess such an aura of sanctity that it cannot be set aside when the facts warrant such reversal, as this Court has often recognized. *Cantey v. McLain Line, Inc.*, 312 U. S. 667, 1941 A. M. C. 657; *Norton v. Warner Co.*, 321 U. S. 565, 1944 A. M. C. 337; and *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187, 1952 A. M. C. 12.

CONCLUSION.

It is, therefore, respectfully submitted that the Petition should be denied, at least as to Respondent Insurance Company of North America.

Respectfully submitted,

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